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Office of The Attorney General  
State of Connecticut

5345

**TESTIMONY OF  
ATTORNEY GENERAL GEORGE JEPSEN  
BEFORE THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES  
MARCH 11, 2014**

Good afternoon Senator Holder-Winfield, Representative Tercyak and members of the Committee. Thank you for the opportunity to testify about House Bill 5345, *An Act Concerning Cooperative Health Care Arrangements*. This bill is nearly identical to an amendment that was filed on a bill voted out of this committee last year. Prior to the time that amendment was filed, I submitted testimony in opposition to substitute language the committee had been considering. For your reference, I have attached a copy of my testimony from 2013.

This year's proposal, like those raised in 2013, 2012, 2011 and prior years, purports to create a state regulatory scheme aimed at providing health care providers with immunity from state and federal antitrust laws. It would allow health care collaboratives - - non-economically integrated independent practice groups - - to negotiate collectively with health plans on rates, notwithstanding the state antitrust laws. The bill would task the Office of the Healthcare Advocate ("OHA") - - an office presently lacking any expertise or legislative mandate to do so - - to function as a regulatory oversight agency. Specifically, it would charge the OHA with: (1) reviewing the antitrust and competitive implications of proposed cooperative arrangements among existing competing health care providers; (2) issuing "certificates of public advantage"; (3) holding hearings; (4) issuing decisions; (5) participating in negotiations; and (6) actively monitoring agreements and the performance of these collaboratives. The bill increases the negotiating leverage of providers by creating one-sided penalties for health care insurers of up to \$25,000 a day for payers who do not "negotiate in good faith" with these cooperatives.

In two previous legislative sessions, legislators contacted the Federal Trade Commission ("FTC") to inquire about the legality and likely competitive impact of similar proposals. Indeed, just last year the Chairs of this Committee wrote to the FTC about the amendment that has now been raised as the bill before you. The FTC has responded consistently, warning that this bill and those like it likely would not create immunity from federal antitrust laws and are "likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers."

I attached the FTC's detailed 2011 analysis to my testimony last year. Last year, the FTC provided additional guidance on the very language before you today. That letter also is attached. In addition, just two weeks ago, FTC Commissioner Maureen Ohlhausen was invited to speak here in Hartford to the Antitrust and Trade Regulation section of the Connecticut Bar Association. A copy of her remarks is attached. After her introduction, she turned to competition advocacy. The first topic she addressed was antitrust immunity - the heart of this

bill. She pointed to the "particularly troublesome...legislative proposals to create antitrust exemptions for collective negotiations by otherwise competing health care providers. The FTC has long advocated against such exemptions for the simple reason that they tend to raise prices and harm consumers." She also recognized that "a central purpose of the proposed legislation appeared to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients."

Antitrust immunity is not necessary to achieve the goals the proponents of this bill argue they seek to achieve. The antitrust laws are not a barrier to beneficial health care collaborations. The formation of numerous Accountable Care Organizations ("ACOs") attests to that fact. The FTC and the United States Department of Justice facilitate ACOs. In 2011, they issued joint guidelines regarding such organizations. Permissible ACOs are comprised of providers who are jointly held accountable for achieving measured quality improvements and reductions in the rate of spending growth.

HB 5345 contravenes the protections afforded to Connecticut's citizens to ensure against unreasonable restraints of trade. If passed, it will lead to higher costs for health care goods and services in this state. I urge the members of this Committee to oppose it.

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*TESTIMONY OF*  
*ATTORNEY GENERAL GEORGE JEPSEN*  
*BEFORE THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES*  
*MARCH 5, 2013*

Good afternoon Senator Osten, Representative Tereyak and members of the Committee. I appreciate the opportunity to testify about House Bill 6431, *An Act Concerning Cooperative Healthcare Arrangements*. This bill is nearly identical to Senate Bill 182 from the 2012 session. My Office opposed that measure last year. For your convenience, I have attached a copy of my testimony from last year, which remains the position of my Office.

It is my understanding, however, that the proponents of HB 6431 have shared substitute language with the Committee. My Office has reviewed the proposed substitute language and I am opposed to that proposal as well. While certain aspects of the proposed substitute bill are different, fundamentally it raises the same concerns as the prior version.

The substitute bill the proponents have shared with the Committee would permit medical doctors, upon receiving a "certificate of public advantage" from the Office of the Healthcare Advocate, to enter into "cooperative arrangements" for a variety of purposes, including the negotiation of "fees, prices or rates with managed care organizations." The bill explicitly exempts such arrangements from state antitrust laws. It also purports to create a state regulatory scheme aimed at providing such arrangements with a "safe harbor" from federal antitrust laws under the "state-action" doctrine.

In 2011, the Co-Chairs and Ranking Members of the Judiciary Committee contacted representatives of the Federal Trade Commission ("FTC") to inquire about the legality and likely competitive impact of a similar proposal. In response, the FTC warned that the proposal likely would not create immunity from federal antitrust laws. The FTC also expressed concerns that the proposed bill would be "likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers." A copy of the FTC's letter is attached to this testimony. For the reasons that follow, the FTC's letter should inform this Committee again this year.

First, under the judicially created "state action" doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the federal antitrust laws. See *Parker v. Brown*, 317 U.S. 341, 351 (1943). Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. In order to meet the requisite elements of the state action doctrine, therefore, (1) the state legislature must clearly articulate a policy to displace competition with regulation,

and (2) state officials must actively supervise the private anticompetitive conduct. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 92 (1980).

The present proposal likely fails to meet either prong of the "state action" immunity doctrine. As to the first prong, the proposed substitute bill fails to articulate any clear public policy for displacing competition with regulation. It also lacks any articulated standards for the Healthcare Advocate to consider when deciding whether to grant, deny, revoke or modify a certificate. The Healthcare Advocate would need to have clear legislative guidance on what would constitute "interdependence and cooperation among physicians for the purpose of efficiently and/or effectively delivering medical care..." for example.

The proposal also lacks an adequate platform and set of criteria for continuing supervision and regulation of these cooperatives, as is required to meet the state action doctrine requirements set forth by the United States Supreme Court. Under that prong of the doctrine, state officials must have a meaningful opportunity to review the anticompetitive conduct of private parties and exercise discretion to disapprove those that do not meet the standards adopted. Here, the Healthcare Advocate appears bound by the terms of the original grant, and would be unable to ensure that the cooperative agreement continues to further state regulatory policies. The "biannual summary" and the ability to request information "regarding compliance" would not provide the Healthcare Advocate with the ability to exercise independent judgment and control. The agency with primary regulatory authority must have the authority to make sufficient inquiries to recognize and remedy undesirable consequences of anticompetitive activity.

In addition, even if the proposal did provide the Healthcare Advocate with an adequate platform and set of criteria for granting certificates and actively supervising the cooperatives, I am not confident that her Office would have the resources necessary to perform that function. I criticized last year's bill, for instance, because it would have required my Office to conduct a detailed and complex review of the benefits of a particular healthcare cooperative arrangement within only 90 days of receiving an application. This year's proposed substitute bill would require the Healthcare Advocate to make a decision within 20 business days.

My Office has experience in complex antitrust investigations. A recently concluded investigation of the competitive impact of a proposed hospital merger in Connecticut took well over a year and included interviews of stakeholders, the study of hospital financial and planning documents and significant support from economists at the FTC. These are resource and time-intensive investigations. This bill would require a state agency with no antitrust expertise and insufficient time and resources to both: (a) conduct the prerequisite analysis necessary to identify and supervise the potential competitive and anticompetitive implications of a proposed cooperative; and (b) actively monitor and supervise the cooperatives. As you know, the Healthcare Advocate's mission is to assist consumers with health care issues through the establishment of effective outreach programs and the development of communications related to consumer rights and responsibilities as members of healthcare plans. Simply put, that office lacks the staff and expertise to conduct a complicated and ongoing antitrust analysis of the type contemplated by this bill.

Lastly, even if the legislature decided to provide the Healthcare Advocate with the resources necessary to perform the functions contemplated by the proposal, there would be significant and ongoing fiscal implications for the State above and beyond the potential costs associated with increased healthcare costs. In 2011, the Office of Fiscal Analysis ("OFA") considered the likely fiscal impact of a similar proposal. A copy of the 2011 OFA Fiscal Note for HB 6343 (2011) is attached to my testimony. At that time, the OFA concluded that the bill would result "in an estimated annual cost of \$663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost "would continue into the future subject to inflation and any violations of the bill's provisions." Moving these responsibilities to the Healthcare Advocate, which lacks the antitrust expertise of my Office, does nothing to diminish the anticipated costs. Rather, it would likely increase those expenses far beyond the \$1,000.00 filing fee provided for under the proposed substitute bill.

For all of these reasons, I urge the Committee not to act favorably upon this proposal at this time. Thank you once again for the opportunity to testify about this proposal.

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Office of The Attorney General  
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TESTIMONY OF  
ATTORNEY GENERAL GEORGE JEPSEN  
BEFORE THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES  
FEBRUARY 28, 2012

Good afternoon Senator Prague, Representative Zalaski, and members of the Committee. I appreciate the opportunity to testify about SB 182, *An Act Concerning Cooperative Healthcare Arrangements*. While I understand and sympathize with the concerns of the proponents of this bill, I have serious reservations about the proposal from both a legal and fiscal perspective.

If enacted, this bill would permit otherwise unaffiliated physicians and other healthcare providers in the State, upon receiving a "certificate of public advantage" from the Office of the Attorney General, to enter into "cooperative arrangements" for a variety of purposes, including to negotiate "fees, prices or rates with managed care organizations." By its terms, the bill exempts such arrangements from state antitrust laws. It also purports to create a state regulatory scheme aimed at providing such arrangements with a "safe harbor" from federal antitrust laws under the "state-action" doctrine.

In 2011, an identical proposal, HB 6343, was raised and acted favorably upon by the Judiciary Committee. Subsequently, the Co-Chairs and Ranking Members of the Judiciary Committee contacted representatives of the Federal Trade Commission (the "FTC") to inquire about the legality and likely competitive impact of the proposal. In response, the FTC provided a detailed written response outlining the agency's concerns that the proposed bill would be "likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers." In addition, the FTC warned that the proposal likely would not create immunity from federal antitrust laws. A copy of the FTC's letter is attached to this testimony.

I share the FTC's view that this proposal fails to meet the test for "state-action" immunity from the federal antitrust laws. Under the judicially-created "state action" immunity doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 351 (1943). Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. In order to meet the requisite elements of the state action doctrine, therefore, (1) the state legislature must clearly articulate a policy to displace competition with regulation, and (2) state officials must actively supervise the private anticompetitive conduct. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 92 (1980).

The first prong, the clear articulation requirement, serves to ensure that the state has authorized departures from free market competition. Most often, articulation can be found through an express statutory provision that permits, but does not compel, anticompetitive conduct. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985). Broad grants of authority will not satisfy the clear articulation requirement. The proposed bill does not include a clearly articulated state policy to displace competition with regulation. As a result, it likely fails to meet the first prong of the *Midcal* test.

Nor does the proposed bill likely satisfy the second prong of the state-action immunity doctrine. This second prong, *Midcal*'s active supervision requirement, ensures that the state action defense "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patriek v. Burget*, 486 U.S. 94, 100-01 (1988). Hence, in order for state supervision to be adequate for state action purposes, state officials must "exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 101. The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that "the State effectively has made [the challenged] conduct its own." *Id.* at 106. Active supervision requires that the state exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Federal Trade Commission v. Floor Tile Insurance Co.*, 504 U.S. 621, 634-35 (1992).

The present proposal requires my Office to conduct a review and make a determination about the benefits of a particular healthcare cooperative arrangement within 90 days of receiving an application and limits ongoing supervision to reviewing annual reports submitted by the cooperative arrangements during the first three years of any such arrangements. Given the highly complex nature of the subject matter involved and the specialized expertise required, including economist support, the construct proposed in the bill does not allow my Office the time and resources necessary to conduct a thorough investigation into the competitive implications of an application and, thus, is not an adequate platform of continuing regulation. As a result, and as the FTC observed last year, the proposed bill likely fails to satisfy *Midcal*'s active supervision prong.

In addition to these significant legal issues, this bill also would place enormous strains on the already limited resources of my Office. In 2011, the Office of Fiscal Analysis ("OFA") considered the likely fiscal impact of the bill. A copy of the 2011 OFA Fiscal Note for HB 6343 is attached to my testimony. The OFA stated that the bill would result "in an estimated annual cost of \$663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost includes \$455,000 in Personal Services, \$25,000 in Other Expenses, \$75,000 in consultant fees and \$108,108 to provide fringe benefits." This cost "would continue into the future subject to inflation and any violations of the bill's provisions." The \$100 filing fee would do little to defray such costs.

In light of the State's current fiscal outlook, it is highly unlikely that the legislature will be able to provide my Office with the necessary resources to implement this proposal. Absent those additional resources, our antitrust lawyers would need to devote a substantial amount of

their time and effort to evaluating and supervising the healthcare cooperative arrangements contemplated by this bill.

Our Antitrust Department is responsible for some of my Office's most important cases and largest monetary recoveries. Since 2005, they have conducted investigations in a number of complex industries, including financial services, healthcare, insurance and pharmaceuticals. Those investigations have resulted in substantial recoveries for consumers and the State of Connecticut. Settlements with five insurance brokers, for instance, brought \$3.5 million in restitution to Connecticut consumers and an additional \$354,000 in civil penalties, which was paid directly to the general fund. Separate settlements with eight insurance carriers resulted in aggregate restitution of almost \$300 million to consumers nationwide and an additional \$35.5 million in civil penalties paid to the State of Connecticut's general fund. In the last fourteen months, my Office led the investigation and eventual settlement with five financial institutions that have paid approximately \$350 million in connection with our ongoing joint, nationwide investigation into the municipal bond derivatives industry.

At the present time, our Antitrust Department is comprised of just six full-time and three part-time attorneys. Devoting four of these full-time attorneys to the activities contemplated by this proposal, which would equate to two-thirds of the full-time attorneys currently assigned to that department, would severely undermine my Office's ability to continue enforcing the State's antitrust laws.

For all of these reasons, I urge the Committee not to act favorably upon this proposal at this time. Thank you once again for the opportunity to testify about this proposal. I would be happy to answer any questions you may have.



## OFFICE OF FISCAL ANALYSIS

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HB-6343

## AN ACT CONCERNING COOPERATIVE HEALTH CARE ARRANGEMENTS.

## OFA Fiscal Note

## State Impact:

Agency Affected	Fund-Effect	FY 12 \$	FY 13 \$
Attorney General	GP - Cost	555,000	555,000
Comptroller Misc. Accounts (Pringo Benefits) <sup>1</sup>	GP - Cost	108,108	108,108
Attorney General; Consumer Protection, Dept.	Various Funds - Revenue Gain	Less than 50,000	Less than 50,000
Comptroller Misc. Accounts (Pringo Benefits) <sup>1</sup>	GP & TF - Potential Cost	Indeterminate	Indeterminate
Social Services, Dept.	GP - Potential Cost	Indeterminate	Indeterminate

Note: GP=General Fund; TF=Transportation Fund

## Municipal Impact:

Municipalities	Effect	FY 12 \$	FY 13 \$
Various Municipalities	Potential Cost	Indeterminate	Indeterminate

## Explanation

The bill results in an estimated annual cost of \$663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost includes \$455,000 in Personal Services, \$25,000 in Other Expenses, \$75,000 in consultant fees and \$108,108 to provide fringe benefits. These employees would be necessary to review these arrangements and issue written decisions approving or denying applications for certificates of public advantage, which authorize health care providers to engage in conduct that could lessen health care competition. Hearings may be necessary to obtain background information. In addition, the AG must actively supervise authorized cooperative health care arrangements and review annual reports submitted by parties to authorized cooperative health care arrangements. It is anticipated that in excess of ten cooperative arrangements may occur.

The bill results in a potential revenue gain of less than \$50,000 as it requires managed care companies to negotiate in good faith with health care providers holding a certificate of public advantage issued by the AG. A company that fails to do so faces a daily \$25,000 civil fine and is in violation of the state's Unfair Trade Practices Act.

The state purchases healthcare services from insurers for individuals served by Medicaid and the state employee health plan. To the extent that the bill increases the cost of providers for which insurers procure services from, there may be an increased cost to the state. In addition, for the same reason identified, there may be an increased cost to municipalities to provide healthcare to the populations they serve.

#### *The Out Years*

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation and any violations of the bill's provisions.

<sup>1</sup> The fringe benefit costs for most state employees are budgeted centrally in accounts administered by the Comptroller. The estimated non-pension fringe benefit cost associated with personnel changes is 23.76% of payroll in FY 12 and FY 13. In addition, there could be an impact to potential liability for the applicable state pension funds.



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy Planning  
Bureau of Economics  
Bureau of Competition

June 8, 2011

Senators Eric D. Coleman and John A. Kissel  
Representatives Gerald Fox and John W. Hetherington  
Connecticut General Assembly  
Room 2500 L.O.B.  
300 Capitol Avenue  
Hartford, CT 06106-1591

Dear Senators Coleman and Kissel and Representatives Fox and Hetherington:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics<sup>1</sup> are pleased to respond to your request for comments on the antitrust provisions of House Bill No. 6343 ("H.B. 6343" or "the Bill"). The Bill, among other things, intends to exempt health care provider-members of certified "cooperative arrangements" from state and federal antitrust laws.<sup>2</sup> The exemption is aimed at immunizing a cooperative's contract negotiations with managed care organizations, but appears to extend to a broad range of other activities as well. We are very concerned that the antitrust provisions of the Bill, if enacted, are likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers. The review provisions in the Bill appear unlikely to prevent these harmful effects.

The Bill is not needed to allow procompetitive cooperative activities by health care providers because antitrust law already permits collaborations that benefit consumers. To the extent that H.B. 6343 is designed to authorize conduct not already permitted under the antitrust laws, it threatens to deprive health care consumers of the benefits of competition. In addition, the regulatory regime contemplated by the Bill may be insufficient to meet the rigorous standards required to confer state action immunity from the federal antitrust laws if that is indeed the intent of the Bill.

<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission (Commission) or of any individual Commissioner. The Commission has, however, voted to authorize staff to submit these comments.

<sup>2</sup> Although the Bill explicitly grants antitrust immunity only under Connecticut law, for purposes of this letter we assume that the immunity is intended to extend to federal antitrust law as well. See *Town of Hallie v. City of Eau Claire*, 471 US 34, 42 (1985) (state legislature's explicit statement recognizing anticompetitive conduct and expectation of antitrust immunity is not necessary for state action doctrine immunity to apply).

## Interest and Experience of the Federal Trade Commission

Congress has charged the Federal Trade Commission ("FTC" or "Commission") with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce.<sup>3</sup> Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental regulations that may impede competition without also offering countervailing benefits to consumers.

Health care competition is critically important to the economy and consumer welfare. For this reason, anticompetitive conduct in health care markets has long been a key focus of FTC activity. The agency has brought numerous antitrust enforcement actions involving the health care industry.<sup>4</sup> In addition, the Commission and its staff have given testimony,<sup>5</sup> issued reports,<sup>6</sup> and engaged in advocacy to state legislatures regarding various aspects of competition in the health care industry. Of particular relevance, the Commission and its staff have long advocated against federal and state legislative proposals that would create antitrust exemptions for collective negotiations by health care providers when such exemptions are likely to harm consumers.<sup>7</sup>

<sup>3</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>4</sup> See Federal Trade Commission, Overview of FTC Antitrust Actions in Health Care Services and Products, Sept. 2010, available at: <http://www.ftc.gov/bc/110120hcupdate.pdf>.

<sup>5</sup> See Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Subcomm. on Courts and Competition Policy, On "Antitrust Enforcement in the Health Care Industry," Dec. 1, 2010; Prepared Statement of the Fed. Trade Comm'n Before the Subcomm. on Consumer Protection, Product Safety, and Insurance, Comm. on Commerce, Science & Transportation, On "The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care," July 16, 2009 (all testimonies available at: <http://www.ftc.gov/osr/testimony/index.shtml>).

<sup>6</sup> See FTD, TRADE COMM'N, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION (Jun. 2009); FTD, TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005); FTD, TRADE COMM'N AND DEPT. OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (Jul. 2004) (all reports available at: <http://www.ftc.gov/reports/index.shtml>).

<sup>7</sup> See FTC Staff Comment to the Hon. Elliott Naishtat Concerning Texas S.B. 8 to Exempt Certified Health Care Collaboratives From the Antitrust Laws (May 2011); FTC Staff Comment to Rep. Tom Emmer of the Minnesota House of Representatives Concerning Minnesota H.F. No. 120 and Senate Bill S.F. No. 203 on Health Care Cooperatives (Mar. 2009); FTC Staff Comment to the Hon. William J. Seltz Concerning Ohio Executive Order 2007-238 to Establish Collective Bargaining for Home Health Care Workers (Feb. 2008); FTC Staff Comment Before the Puerto Rico House of Representatives Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers (Jan. 2008) (all advocacies available at: [http://www.ftc.gov/opp/advocacy\\_date.shtml](http://www.ftc.gov/opp/advocacy_date.shtml)). See also Letter to Hon. Rene O. Oliviera, Concerning Texas Physician Collective Bargaining (May 1999) (available at: <http://www.ftc.gov/bc/y990002.shtml>); Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Concerning H.R. 1304, the "Quality Health-Care Coalition Act of 1999," June 22, 1999, available at: <http://www.ftc.gov/os/1999/06/healthcaretestimony.htm>.

### The Connecticut Bill

H.B. 6343 allows the establishment of "cooperative arrangements" -- agreements among health care providers -- and apparently intends to provide them with an exemption from the antitrust laws upon approval by the Connecticut Attorney General. That immunity would extend to "sharing, allocating or referring patients, personnel, instructional programs, support services or facilities or medical, diagnostic or laboratory facilities or procedures, or negotiating fees, prices or rates with managed care organizations, and includes, but is not limited to, a merger, acquisition or joint venture."<sup>8</sup> The Bill also prohibits managed care organizations from refusing to negotiate "in good faith" with parties in a certified cooperative arrangement. A managed care organization that violates this prohibition is subject to a penalty of up to \$25,000 per day.<sup>9</sup>

To qualify as a cooperative arrangement under the Bill, the health care providers must apply for and receive a "certificate of public advantage" from the Connecticut Attorney General.<sup>10</sup> The Attorney General's review of an application must consider the benefits of the arrangement, including "enhancement of the quality of health services to consumers; gains in cost efficiency of providing health services; improvement in utilization of and access to health services and equipment; and avoidance of duplication of health resources."<sup>11</sup> The Attorney General must compare these benefits against any disadvantages, including "the potential reduction in competition; the adverse impact on quality, access or price of health care services to consumers; and the availability of arrangements that achieve the same benefits with less restriction on competition."<sup>12</sup> The Attorney General must then determine whether the "benefits outweigh the disadvantages" and approve or deny the application within ninety days of receiving it.<sup>13</sup>

The Attorney General is also responsible for overseeing the cooperative arrangements by reviewing annual progress reports.<sup>14</sup> If, through this review, the Attorney General determines that the benefits of the cooperative arrangement no longer outweigh the disadvantages, he must hold a hearing to determine whether to revoke or modify the certificate.<sup>15</sup> The Attorney General, however, may not "modify or revoke a certificate of public advantage more than three years after the initial issuance" of the certificate.<sup>16</sup>

<sup>8</sup> H.B. 6343 § 1(a)(1) (Conn. 2011).

<sup>9</sup> H.B. 6343 § 1(e) (Conn. 2011).

<sup>10</sup> H.B. 6343 § 1(b) (Conn. 2011).

<sup>11</sup> H.B. 6343 § 1(o)(2) (Conn. 2011).

<sup>12</sup> *Id.*

<sup>13</sup> H.B. 6343 § 1(o)(1) (Conn. 2011).

<sup>14</sup> H.B. 6343 § 1(o)(4) (Conn. 2011).

<sup>15</sup> H.B. 6343 § 1(o)(5) (Conn. 2011).

<sup>16</sup> *Id.*

### The Likely Effects of H.B. 6343

The antitrust exemption in the Bill is unnecessary to promote health care benefits to consumers through cooperative arrangements. This is because the antitrust laws already allow procompetitive collaborations among competitors. The Bill, which is designed to allow coordinated activity among health care competitors beyond that permitted by the antitrust laws, poses a substantial risk of consumer harm by increasing costs, impeding innovation, and decreasing access to health care. Even with oversight by the Attorney General, that consumer harm may be difficult to prevent once a cooperative is certified.

#### (n) The Bill Is Unnecessary to Promote Arrangements That Will Benefit Consumers

Federal antitrust law already permits joint activity by health care providers that benefits consumers. First, even providers' price agreements are lawful when reasonably necessary to create efficiencies (such as reducing the cost or improving the quality of health care provided to patients), and have an overall procompetitive effect. For example, antitrust standards distinguish between effective clinical integration among health care providers that has the potential to achieve cost savings and improve health outcomes and those provider arrangements that exist merely to give the providers greater bargaining leverage with health plans. Both the FTC and its staff and the U. S. Department of Justice have provided substantial guidance to providers to make clear that the antitrust laws do not prevent health care providers from engaging in beneficial collaborations.<sup>17</sup> The antitrust laws are designed to stop actions that raise prices or inhibit new forms of competition; they do not block activities that benefit consumers. We therefore not only see no need for legislation to authorize collective fee negotiations that would arguably benefit consumers, we are also concerned that any new legislation may instead have the effect of immunizing agreements among providers, and potentially harm consumers.

Second, no antitrust exemption is needed to permit health care providers to

<sup>17</sup> See, e.g., Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), available at: <http://www.fto.gov/foi/healthcare/industryguide/policy/index.htm>; TriState Health Partners, Inc., Letter from Markus Meier, FTC to Christi Braun, Ober, Kaler, Grimes & Shriver, April 13, 2009; Greater Rochester Independent Practice Association, Inc., Letter from Markus Meier, FTC to Christi Braun & John J. Miles, Ober, Kaler, Grimes & Shriver, September 17, 2007, letters available at: <http://www.fto.gov/foi/healthcare/industryguide/advisory.htm>. See also Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: <http://www.fto.gov/foi/2000/04/fedolguidelines.pdf>. Most recently, the FTC and DOJ released a joint statement explaining how the reviewing antitrust agency will enforce U.S. antitrust laws against the new Accountable Care Organizations -- groups of health care providers that, if they are likely to lower costs and cause improvements in the availability of health care, will be permitted under the Affordable Care Act of 2010 to operate. Fed. Trade Comm'n and the Antitrust Division of the Department of Justice: Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, available at: <http://www.fto.gov/foi/fedrop/2011/03/110331acofsm.pdf>.

discuss their concerns regarding health plan practices, whether among themselves or with health plans. We understand that some supporters of the Bill may be under the impression that any such discussions would violate the antitrust laws. But that is not the case. Health care professionals may, under existing antitrust law, engage in collective advocacy, both to promote the interests of their patients and to express their opinions about other issues, such as payment delays, dispute resolution procedures, and other matters.<sup>18</sup>

**(b) The Bill Poses a Substantial Risk of Consumer Harm**

The Bill is intended to extend antitrust immunity to a broad range of agreements among health care providers to eliminate competition. Regardless of any stated intent by a health care provider to improve health care quality and control costs, the practical effect of the Bill will be to exempt anticompetitive conduct from antitrust scrutiny. We think this would pose an unnecessary and substantial risk of consumer harm.

It is well-recognized that antitrust exemptions routinely threaten broad consumer harm for the benefit of a few. The bipartisan Antitrust Modernization Committee observed "[t]ypically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality and reduced innovation."<sup>19</sup> The Bill appears intended to shield a broad range of potentially anticompetitive conduct from antitrust challenge. Such anticompetitive conduct may include cooperative agreements not to compete with regard to patients, procedures, personnel, or support services, agreements on the fees providers will accept from health plans, and agreements that will have the effect of eliminating beneficial competition through merger.

In addition, the Bill's requirement that managed care organizations negotiate with parties to a cooperative agreement – backed up with a potential civil penalty of \$25,000 per day for a failure to negotiate "in good faith" – compounds the likely consumer harm.<sup>20</sup> This requirement not only will decrease the incentives of cooperatives to

<sup>18</sup> The 1996 *Statements of Antitrust Enforcement Policy in Health Care* issued by the Commission and the Department of Justice explain the ways in which antitrust law permits health care providers to collectively provide both fee and non-fee related information to health plans. (Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>) See also Letter to Gregory Q. Blinford (February 6, 2003) (advisory opinion explaining that physicians' proposed formation of advocacy group to collect and disseminate information about health plan policies and procedures, including fees paid to local physicians compared to fees paid in other areas, did not appear likely to have anticompetitive effects). See also American Medical Assn, Model Managed Care Contract (4th Ed. 2005), available at [http://www.ama-assn.org/ama/pub/upload/mm/368/mmcc\\_4th\\_ed.pdf](http://www.ama-assn.org/ama/pub/upload/mm/368/mmcc_4th_ed.pdf).

<sup>19</sup> Antitrust Modernization Commission, Report and Recommendations (April 2007) at 335, available at [http://govinfo.library.unt.edu/amo/report\\_recommendation/amo\\_final\\_report.pdf](http://govinfo.library.unt.edu/amo/report_recommendation/amo_final_report.pdf).

<sup>20</sup> Antitrust jurisprudence recognizes a party's long-established right to exercise its discretion over with whom it deals. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

compete on price and quality, but also threatens the ability of health plans to effectively use selective contracting, a key mechanism for promoting quality and cost-containment goals. Furthermore, the lack of clarity surrounding what constitutes "good faith" negotiation in this context may discourage plans from actively pursuing programs and contract terms that would benefit consumers. Moreover, determining liability based on a failure to negotiate in "good faith" could require courts to assess the reasonableness of prices and other terms of dealing, a role for which they are ill-suited.<sup>21</sup>

It will be difficult, if not impossible, for the Attorney General's review to protect consumers from the harmful effects of this legislation. First, it is not clear that the Attorney General has the necessary funds or available resources to conduct the type of fact-intensive, time-consuming market analysis needed to evaluate the competitive effects of a health care cooperative during the certification process. The time allotted for the Attorney General's review is limited to ninety days and the standards under which the Attorney General may assess the cooperatives are unclear. Second, the Attorney General's ability to remedy the harm caused by an anticompetitive cooperative, once formed, is limited. The Attorney General's oversight relies solely on his or her review of a cooperative's annual "progress report." Moreover, even if the Attorney General finds a cooperative arrangement has caused consumer harm, the power to address such problems is circumscribed by the limited remedy (revocation or modification of certification) as well as the limited grounds for exercising that remedy. Thus, if a cooperative has used its market power to increase prices without countervailing benefit, there is no means to remedy that harm. Third, once three years have passed since a cooperative's certification, the Attorney General has no power to modify or revoke the purported antitrust immunity conveyed by the certification, regardless of the circumstances. Thus, the review provisions will not protect consumers from the likely harm created by the Bill.

#### **The Bill Likely Will Not Create State Action Immunity**

The federal antitrust immunity that the Bill apparently purports to confer on cooperative arrangements is effective only if the State of Connecticut has clearly articulated an intention to replace competition in this area with a regulatory scheme, and actively supervises this private conduct.<sup>22</sup> The active supervision test seeks to determine "whether the State has exercised sufficient independent judgment and control so that the details [of the restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties."<sup>23</sup> As explained by the Supreme Court in *Parker v. Burget*, state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."<sup>24</sup>

<sup>21</sup> *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

<sup>22</sup> *Parker v. Brown*, 317 U.S. 341, 351 (1943); see also *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

<sup>23</sup> *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621, 634 (1992).

<sup>24</sup> 486 U.S. 94, 101 (1988).



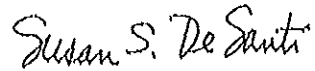
Here, the State's review proposed under the Bill does not appear sufficient to meet the requirements of the state action doctrine. Notwithstanding the requirement that annual progress reports be filed by the health care providers during the initial three-year period, the Bill seemingly would not require State officials to review particular contracts and fee arrangements between groups of providers and payors to assess whether they comport with State policy goals (including but not limited to the goals stated under section 1(c)(2) of the Bill), and to remedy on an ongoing basis situations that may violate those goals. Notably also, the Bill does not appear to mandate *any* state monitoring and review of cooperative arrangements three years after the initial issuance of a certificate. As the Supreme Court has made clear, parties claiming state action immunity face a high bar. The regulatory program proposed by the Bill appears not to clear that bar.

#### Conclusion

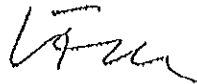
Our analysis of H.B. 6343 suggests that its passage would pose a significant risk of increased health care costs and decreased access to care for Connecticut consumers. The antitrust immunity provisions in this legislation are unnecessary and would allow groups of private health care providers to engage in unsupervised anticompetitive conduct. In summary, FTC staff is concerned that this legislation is likely to foster anticompetitive conduct that is inconsistent with federal antitrust law and policy, and that such conduct could work to the detriment of Connecticut health care consumers.

We appreciate your consideration of these issues.

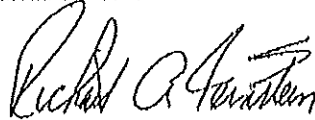
Respectfully submitted,



Susan S. DeSanti, Director  
Office of Policy Planning



Joseph Farrell, Director  
Bureau of Economics



Richard A. Feinstein, Director  
Bureau of Competition



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy Planning  
Bureau of Economics  
Bureau of Competition

June 4, 2013

The Hon. Catherine Osten and the Hon. Peter Tercyak, Co-Chairs  
Labor and Public Employees Committee, Connecticut General Assembly  
Legislative Office Building, Room 3800  
Hartford, CT 06106

Re: Request for Comment on H.B. 6431

Dear Senator Osten and Representative Tercyak:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics<sup>1</sup> are pleased to respond to your request for comment on the potential competitive impact of Connecticut House Bill 6431, "An Act Concerning Cooperative Health Care Arrangements," as amended by LCO Number 6504 ("H.B. 6431" or "the Bill").<sup>2</sup> The Bill provides for the formation of "health care collaboratives" comprising otherwise independent health care practitioners. The Bill would authorize these and similar "prospective" entities to jointly negotiate prices and other terms with health plans. It also attempts to immunize these joint negotiations from scrutiny under the antitrust laws.

FTC staff recognize that collaborations among physicians and other health care professionals can be fruitful. At the same time, we write to express strong concerns that the Bill is based on inaccurate premises about the antitrust laws and the value of competition among physicians. If enacted, it will very likely benefit only participating physicians, who seek to enhance their bargaining power in selling their services, while harming health care competition and health care consumers in Connecticut.

- First, the antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers. As explained in extensive guidance issued by the federal Antitrust Agencies, competitor collaborations – including health care provider collaborations – often are entirely consistent with the antitrust laws.

- Second, a central purpose of the Bill appears to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients.
- Third, because procompetitive health care collaborations already are permissible under the antitrust laws, the Bill's main effect would be to foster precisely those types of collective negotiations that would *not* generate efficiencies and therefore would *not* pass muster under the antitrust laws. The joint negotiations contemplated by the Bill are likely to lead to increased health care costs and decreased access to health care services for Connecticut consumers.

This Bill raises competition concerns similar to those raised by proposals for "Cooperative Health Care Arrangements" considered in prior sessions of the Connecticut General Assembly. As you may know, FTC staff reviewed one such bill in 2011,<sup>3</sup> and the analysis in that letter (attached) still applies. Connecticut Attorney General George Jepson's recent testimony before your committee, in opposition to the Bill as introduced, reflects many of the same concerns.<sup>4</sup>

#### **I. Interest and Experience of the Federal Trade Commission**

Congress has charged the Federal Trade Commission ("FTC" or "Commission") with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>5</sup> Competition is at the core of America's economy,<sup>6</sup> and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.<sup>7</sup> Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental laws and regulations that may impede competition without also providing countervailing benefits to consumers.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key focus of FTC law enforcement,<sup>8</sup> research,<sup>9</sup> and advocacy.<sup>10</sup> Of particular relevance, the Commission and its staff have long advocated against federal and state legislative proposals that seek to create antitrust exemptions for collective negotiations by health care providers, as such exemptions are likely to harm consumers.<sup>11</sup>

## **II. The Connecticut Bill**

As noted above, the Bill (as amended) provides for the formation of "health care collaboratives" – certain collaborations or joint ventures of otherwise independent health care practitioners.<sup>12</sup> The Bill further provides that any such collaborative, and any "prospective health care collaborative," may jointly negotiate price and other terms with health plans.<sup>13</sup> All health plans – broadly defined to include any entity, large or small, "that pays for health care services"<sup>14</sup> – would be required to negotiate with such collaboratives "in good faith,"<sup>15</sup> subject to mandatory mediation by a state-designated mediator should negotiations prove unsuccessful.<sup>16</sup> Health plans – but not collaboratives – would be subject to large monetary penalties for failing to negotiate as required.<sup>17</sup> Finally, the Bill appears to intend that these joint negotiations will occur unconstrained by the antitrust laws.<sup>18</sup>

## **III. The Bill Is Unnecessary Because the Antitrust Laws Already Permit Efficient Health Care Collaborations**

A fundamental premise of the Bill is that efficient, procompetitive collaborations among otherwise independent health care providers are prohibited under the antitrust laws, to the detriment of health care consumers. Testimony by numerous physician groups supporting the Bill stated, "federal antitrust laws prohibit Connecticut physicians from collective discussions about certain critical aspects of care coordination," including the kinds of negotiations necessary to form Accountable Care Organizations ("ACOs"),<sup>19</sup> as contemplated by the Patient Protection and Affordable Care Act ("ACA").<sup>20</sup> This premise is simply and categorically wrong.

The antitrust laws already recognize, and have long stood for the proposition, that competitor collaborations can be procompetitive. To assist the business community in distinguishing between lawful and potentially harmful forms of competitor collaboration, the FTC and its sister federal antitrust agency, the U.S. Department of Justice ("DOJ") (together, "the Antitrust Agencies"), have issued considerable guidance over the years. Key sources of guidance include the Antitrust Agencies' general guidelines on collaborations among competitors,<sup>21</sup> as well as joint statements specifically addressing the application of the antitrust laws to the health care industry, including physician network joint ventures and other provider collaborations.<sup>22</sup> In addition, FTC staff have issued and made public numerous advisory opinion letters containing detailed analyses of specific proposed health care collaborations.<sup>23</sup> These letters have helped the requesting parties avoid potentially unlawful conduct as they seek to devise new ways of responding to the demands of the marketplace. They also have provided further guidance to the health care industry as a whole.

ACOs neither need, nor deserve, special treatment under the antitrust laws. ACOs are intended to comprise "providers who are jointly held accountable for achieving measured quality improvements and reductions in the rate of spending growth."<sup>24</sup> Antitrust analysis recognizes and takes into account procompetitive effects such as cost savings and quality improvements, and in this manner is entirely consistent with the goals

of the ACO program. Many ACOs already have been formed, both for participation in Medicare's Shared Savings Program (introduced by the ACA) and for offering services to commercial markets. In January 2013, the Centers for Medicare and Medicaid Services ("CMS") announced that more than 250 ACOs already had been established under its own programs,<sup>25</sup> with roughly half being "physician-led organizations that serve fewer than 10,000 beneficiaries."<sup>26</sup> Hundreds of additional ACO-type organizations reportedly have formed outside the Medicare program.<sup>27</sup> This empirical evidence belies claims that antitrust concerns are chilling the development of physician-sponsored ACOs.

The Antitrust Agencies have been closely involved in providing guidance concerning both Medicare and commercial ACO formation, to ensure that the prospect of antitrust liability does not impede the formation of beneficial ACOs.<sup>28</sup> As CMS noted in publishing the final ACO rules, CMS and the Antitrust Agencies "worked very closely ... to develop policies to encourage participation and ensure a coordinated and aligned inter- and intra-agency program implementation."<sup>29</sup> On the same day the CMS ACO rules were published, the Antitrust Agencies released a joint statement explaining their enforcement policy approach to ACOs "to ensure that health care providers have the antitrust clarity and guidance needed to form procompetitive ACOs that participate in both Medicare and commercial markets."<sup>30</sup> In addition, the FTC/DOJ ACO policy statement establishes a process for newly formed ACOs to seek expedited antitrust guidance if they are concerned about potential antitrust exposure.<sup>31</sup> As of April 2013, two provider groups had availed themselves of this option.<sup>32</sup> The Antitrust Agencies continue to engage in interagency collaboration, as well as consultation with physician groups and other stakeholders.<sup>33</sup>

Thus, the antitrust laws do not stand in the way of health care providers in Connecticut who form ACOs or other collaborative arrangements that are likely to reduce costs and benefit health care consumers through improved efficiency and improved coordination of care.

#### **IV. Conferring Additional Bargaining Power on Groups of Otherwise Competing Physicians Poses a Substantial Risk of Consumer Harm**

Given that efficient collaborations among health care providers already are consistent with the antitrust laws, FTC staff are concerned that the Bill will only serve to encourage conduct that likely would *not* pass muster under the antitrust laws because it would reduce competition, raise prices, and provide relatively small or no benefits to consumers. Any effort to shield such harmful conduct from antitrust enforcement – including attempts to confer state action immunity – is likely to harm Connecticut health care consumers.

In its 2007 report, the bipartisan Antitrust Modernization Commission succinctly stated a widely recognized proposition: "[t]ypically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality and reduced innovation."<sup>34</sup> In other words,

antitrust exemptions threaten broad consumer harm while benefitting only certain market participants.

Yet, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from payers, asserting that immunity for joint bargaining is necessary to "level the playing field" so that providers can create and exercise countervailing market power.<sup>35</sup> In a 2004 report on health care competition, the Antitrust Agencies jointly responded to and countered this argument:

Some physicians have lobbied heavily for an antitrust exemption to allow independent physicians to bargain collectively. They argue that payors have market power, and that collective bargaining will enable physicians to exercise countervailing market power. The Agencies have consistently opposed these exemptions, because they are likely to harm consumers by increasing costs without improving quality of care. The Congressional Budget Office estimated that proposed federal legislation to exempt physicians from antitrust scrutiny would increase expenditures on private health insurance by 2.6 percent and increase direct federal spending on health care programs such as Medicaid by \$11.3 billion.<sup>36</sup>

The Bill under consideration in Connecticut arguably would permit precisely this form of anticompetitive bargaining between independent health care providers.<sup>37</sup>

#### **V. Antitrust Exemptions That Immunize Otherwise Anticompetitive Conduct Pose a Substantial Risk of Consumer Harm and Are Disfavored**

The U.S. Supreme Court recently reiterated its long-standing position that, "given the antitrust laws' values of free enterprise and economic competition, 'state-action immunity is disfavored.'"<sup>38</sup> This principle applies with equal force in the health care industry, where consumers benefit from vigorous competition, and where anticompetitive conduct can cause significant harm.<sup>39</sup> As discussed above, antitrust law permits many forms of procompetitive collaborations among health care providers. Antitrust laws also serve the important function of protecting health care consumers from pernicious forms of joint conduct, which is why antitrust immunity for otherwise-anticompetitive provider collaborations is likely to harm consumers. Given the substantial risk that the Bill will encourage the formation of inefficient and anticompetitive collaborations among health care providers, we urge Connecticut legislators not to attempt to shield them from the antitrust laws by attempting to invoke the state action doctrine.

#### **Conclusion**

Our analysis of H.B. 6431, as amended, suggests that its passage would pose a significant risk of harm to Connecticut consumers. The Bill's attempt to confer antitrust immunity is unnecessary for legitimate collaborations and, if effective, would encourage groups of private health care providers to engage in blatantly anticompetitive conduct. In summary, FTC staff is concerned that this legislation is likely to foster anticompetitive

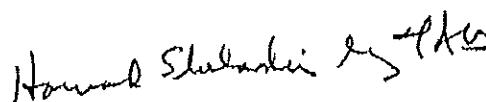
conduct that is inconsistent with federal antitrust law and policy, and that such conduct could work to the detriment of Connecticut health care consumers.

We appreciate your consideration of these issues.

Respectfully submitted,



Andrew I. Gavil, Director  
Office of Policy Planning



Howard Shelanski, Director  
Bureau of Economics



Richard A. Feinstein, Director  
Bureau of Competition

#### Attachments

<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission (Commission) or of any individual Commissioner. The Commission has, however, voted to authorize staff to submit these comments.

<sup>2</sup> Letter from the Hon. Catherine Osten and the Hon. Peter Tercyak, Connecticut General Assembly, to Andrew I. Gavil, Director, Office of Policy Planning, Fed. Trade Comm'n, May 20, 2013.

<sup>3</sup> FTC Staff Comment to Senators Coleman and Kissel and Representatives Fox and Hetherington, Connecticut General Assembly, Concerning Connecticut H.B. 6343, Intended To Exempt Members of Certified Cooperative Arrangements From the Antitrust Laws (June 2011), available at <http://www.ftc.gov/os/2011/06/110608che.pdf>.

<sup>4</sup> Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Mar. 5, 2013) (regarding AG's opposition to H.B. 6431, as introduced); *see also* Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Feb. 28, 2012) (regarding AG's opposition to prior "cooperative health care arrangements" bill, S.B. 182).



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<sup>5</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>6</sup> *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

<sup>7</sup> See *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

<sup>8</sup> See generally Fed. Trade Comm'n, *An Overview of FTC Antitrust Actions In Health Care Services and Products* (Mar. 2013), available at <http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf>; see also Fed. Trade Comm'n, *Competition in the Health Care Marketplace: Formal Commission Actions*, available at <http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm>.

<sup>9</sup> See, e.g., FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE ("DOJ"), *IMPROVING HEALTH CARE: A DOSE OF COMPETITION* (2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcare rpt.pdf> [hereinafter *FTC & DOJ, IMPROVING HEALTH CARE*]. The report was based on, among other things, 27 days of formal hearings on competitive issues in health care, an FTC sponsored workshop, independent research, and the Agencies' enforcement experience.

<sup>10</sup> FTC and staff advocacy may comprise letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. See, e.g., FTC Staff Letter to the Honorable Theresa W. Conroy, Connecticut House of Representatives, Concerning the Likely Competitive Impact of Connecticut House Bill 6391 on Advance Practice Registered Nurses ("APRNs") (Mar. 2013), available at <http://www.ftc.gov/os/2013/03/130319apmconroy.pdf> (competitive impact of statutorily required "collaborative practice agreements" for nurse practitioners); FTC and DOJ Written Testimony Before the Illinois Task Force on Health Planning Reform Concerning Illinois Certificate of Need Laws (Sept. 2008), available at <http://www.ftc.gov/os/2008/09/V080018ilconlaws.pdf>; Brief of the Fed. Trade Comm'n as Amicus Curiae, *St. Joseph Abbey, et al. v. Castille*, 712 F.3d 215 (5th Cir. 2013) (No. 11-30756) (refuting argument that the policies of FTC funeral rule support restrictions of sort challenged by petitioner); *FTC & DOJ, IMPROVING HEALTH CARE*, *supra* note 9.

<sup>11</sup> See, e.g., FTC Staff Comment to Senators Coleman and Kissel and Representatives Fox and Hetherington, Connecticut General Assembly, *supra* note 3; FTC Staff Comment to the Hon. Elliott Naishat Concerning Texas S.B. 8 to Exempt Certified Health Care Collaboratives From the Antitrust Laws (May 2011), available at <http://www.ftc.gov/os/2011/05/11051105texashealthcare.pdf>; FTC Staff Comment to Rep. Tom Emmer of the Minnesota House of Representatives Concerning Minnesota H.F. No. 120 and Senate Bill S.F. No. 203 on Health Care Cooperatives (Mar. 2009), available at <http://www.ftc.gov/opp/advocacy/V090003.pdf>; FTC Staff Comment to the Hon. William J. Seltz Concerning Ohio Executive Order 2007-23S to Establish Collective Bargaining for Home Health Care Workers (Feb. 2008), available at <http://www.ftc.gov/os/2008/02/V080001homecare.pdf>; FTC Staff Comment Before the Puerto Rico House of Representatives Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers (Jan. 2008); available at <http://www.ftc.gov/os/2008/02/V080003puerto.pdf> (all advocacies available at [http://www.ftc.gov/opp/advocacy\\_date.shtml](http://www.ftc.gov/opp/advocacy_date.shtml)). See also Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property, Competition, and the Internet Concerning H.R. 1946, the "Preserving Our Hometown Independent Pharmacies Act of 2011," Mar. 29, 2012, available at <http://www.ftc.gov/os/testimony/120329pharmacytestimony.pdf>.

<sup>12</sup> H.B. 6431 §§ 1-2.

<sup>13</sup> *Id.* at § 2(a).

<sup>14</sup> *Id.* at § 1(4) ("Health plan" means an entity that pays for health care services, including, but not limited to, commercial health insurance plans, self-insurance plans, health maintenance organizations, managed care organizations, as defined in section 38a-478 of the general statutes, or any insurer or corporation subject to the insurance laws of this state.").

<sup>15</sup> *Id.* at § 4(d)(1).

<sup>16</sup> *Id.* at § 4(b), (b)(1)-(3).

<sup>17</sup> *Id.* at § 4(d)(1)-(2) (providing that civil penalties up to \$25,000 per day, per each distinct violation, may apply to any health plan that violates pertinent provisions).

<sup>18</sup> *Id.* at § 2(a) (stipulating that joint negotiations may take place "[n]otwithstanding the antitrust laws"). The raised bill purports "[t]o permit health care providers to enter into cooperative arrangements that would not be subject to certain antitrust laws," Conn. Gen. Assembly, Raised H.B. No. 6431, Session Year 2013, available at [http://www.oga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB6431&which\\_year=2013#](http://www.oga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB6431&which_year=2013#). According to an analysis by the General Assembly's Office of Legislative Research, the Bill would, at the least, "generally exempt [approved collaboratives] from state antitrust laws." Conn. Gen. Assembly OLR Bill Analysis, available at <http://www.oga.ct.gov/2013/BA/2013HB-06431-R000217-BA.htm>.

<sup>19</sup> Conn. State Medical Soc'y, Am. Coll. Surgeons Conn. Chapter, Am. Coll. Physicians Conn. Chapter, Conn. Orthopaedic Soc'y, Conn. Soc'y of Eye Physicians, Conn. Dermatology & Dermatologic Surgery Soc'y, Conn. ENT Soc'y, & Conn. Urology Soc'y, Testimony in Support of House Bill 6431 An Act Concerning Cooperative Health Care Arrangements, Presented to the Labor & Pub. Employees Comm. (Mar. 5, 2013).

<sup>20</sup> Pub. L. No. 111-148, § 3022, 14 Stat. 119, 395 ("Affordable Care Act").

<sup>21</sup> Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>22</sup> Fed. Trade Comm'n & U.S. Dep't of Justice Statements of Antitrust Enforcement Policy In Health Care (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>. See, e.g., *id.* at Statement 8 (physician network joint ventures), Statement 7 (joint purchasing arrangements among providers of health care services), and Statement 6 (provider participation in exchanges of price and cost information).

<sup>23</sup> See, e.g., Letter from Markus H. Meier, Fed. Trade Comm'n to Michael E. Joseph, Esq., McAfee & Taft, Re: Norman PHO Advisory Opinion, Feb. 13, 2013, available at <http://www.ftc.gov/os/2013/02/130213normanphoadvlttr.pdf>; Letter from Markus H. Meier, FTC to Christl Braun, Ober, Kaler, Grimes & Shriver, Re: TriState Health Partners, Inc. Advisory Opinion, Apr. 13, 2009, available at <http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf>; Letter from Markus Meier, FTC to Christl Braun & John J. Miles, Ober, Kaler, Grimes & Shriver, Re: Greater Rochester Independent Practice Association, Inc. Advisory Opinion, Sept. 17, 2007, available at <http://www.ftc.gov/bc/adops/gripa.pdf>.

<sup>24</sup> Mark McClellan et al., *A National Strategy to Put Accountable Care into Practice*, 29 HEALTH AFFAIRS 982, 982 (2010).

<sup>25</sup> Ctrs. Medicare & Medicaid Servs., Press Release, *More Doctors, Hospitals Partner to Coordinate Care for People with Medicare* (Jan. 10, 2013), available at <http://www.cms.gov/apps/media/press/release.asp?Counter=4501&intNumPerPage=10&checkDate=&checkKey=&srchType=1&numDays=3500&srchOpt=0&srchData=&keywordType=All&chkNewsType=1%2C+2%2C+3%2C+4%2C+5&intPage=&showAll=&pYear=&year=&desc=&choOrder=date>.

<sup>26</sup> *Id.* In addition, "[a]pproximately 20 percent of ACOs include community health centers, rural health clinics and critical access hospitals that serve low-income and rural communities." *Id.*

<sup>27</sup> For example, David Muhlestein has estimated "428 total ACOs now existing in 49 states." David Muhlestein, *Continued Growth of Public and Private Accountable Care Organizations*, HEALTH AFFAIRS BLOG (Feb. 19, 2013) (counting, e.g., ACOs formed solely on the private side and those negotiated directly with state Medicaid programs), available at <http://healthaffairs.org/blog/2013/02/19/continued-growth-of-public-and-private-accountable-care-organizations/>; cf. McClellan et al., *supra* note 24, at 983 (describing

diverse ACOs including, as of 2010, a Brookings/Dartmouth Accountable Care Collaborative comprising "approximately sixty provider systems across the country.").

<sup>28</sup> See generally Susan S. DeSanti, *ACO Antitrust Guidelines: Coordination Among Federal Agencies*, 11-2 ANTITRUST SOURCE 1 (Dec. 2011).

<sup>29</sup> Dep't Health & Human Servs., Ctrs. Medicare & Medicaid Servs. ("CMS"), 42 CFR Part 425, Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations (Final Rule), 76 Fed. Reg. 67802, 67804 (Nov. 2, 2011).

<sup>30</sup> Fed. Trade Comm'n & U.S. Dep't. of Justice Working Group Issues Summary of Activities Since October 2011 Release of ACO Antitrust Enforcement Policy (Apr. 10, 2013), available at <http://www.ftc.gov/bc/healthcare/aco/mssp-summary.pdf>. The policy statement itself is, Fed. Trade Comm'n and U.S. Dep't of Justice: Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026 (Oct. 28, 2011) [hereinafter FTC/DOJ ACO Policy Statement] (explaining Agency views on operations of ACOs in private health care markets as well as the Medicare Shared Savings Program).

<sup>31</sup> FTC/DOJ ACO Policy Statement, *supra* note 30, at 67030-31.

<sup>32</sup> Fed. Trade Comm'n & U.S. Dep't. of Justice Working Group Issues Summary, *supra* note 30.

<sup>33</sup> The CMS final rule, and the FTC/DOJ policy statement, followed extensive research and consultation by the agencies with key stakeholders in the health care community. For example, in 2010, the FTC, CMS, and HHS jointly sponsored a public workshop to explore ACO-related issues, with formal participation by physician groups, payers, institutional providers, regulators, and academics, among others, and with written comments solicited from the public at large. Information regarding the "Workshop Regarding Accountable Care Organizations and Implications Regarding Antitrust, Physician Self-Referral, Anti-Kickback and Civil Monetary Penalty Laws," held at CMS on Oct. 5, 2010, with links to the agenda, public comments, and workshop transcripts, can be found at <http://www.ftc.gov/opp/workshops/aco/index.shtml#webcast>. The Commission held a second public workshop to explore ACO formation issues – including issues raised by the proposed FTC/DOJ ACO policy statement – in May 2011. Information regarding the FTC's May 9, 2011 workshop, "Another Dose of Competition: Accountable Care Organizations and Antitrust," can be found at <http://www.ftc.gov/opp/workshops/aco2/index.shtml>.

<sup>34</sup> ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 335 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>35</sup> In general, the Supreme Court has flatly rejected the notion that members of the learned professions should be free from antitrust scrutiny: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975); see also *Nat'l Soc'y Prof'l Engineers*, 435 U.S. 679, 695 (1978) (Supreme Court rejection of argument that competition itself poses a "potential threat . . . to the public safety"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

<sup>36</sup> FTC & DOJ, IMPROVING HEALTH CARE, *supra* note 9, at 14. For example, a recent FTC enforcement action concerned "an agreement among eight independent nephrologists in southwestern Puerto Rico to fix the prices and the conditions under which they would participate in 'Mi Salud,' the Commonwealth of Puerto Rico's Medicaid program for providing healthcare services to indigent residents. In furtherance of their conspiracy, Respondents collectively terminated their participation in the Mi Salud program in southwestern Puerto Rico after the program's regional administrator . . . refused to accede to Respondents' demands to restore a cut in reimbursements for certain patients eligible for benefits under both Medicare and Mi Salud ('dual eligibles'). After Respondents terminated their service agreements with Humana, they refused to treat any of Humana's Mi Salud patients." *In the Matter of Práxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael García Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D.*, FTC File No. 121-0098, C-4402 (Complaint), 2 (May 3, 2013), available at <http://ftc.gov/os/caselist/1210098/130503pnephrologistscmpt.pdf>.

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<sup>37</sup> In addition, the asymmetric "good faith" negotiation requirement and threat of very large fines, applicable to all health plans, large and small (*supra* note 17), will likely decrease the incentives of cooperatives to compete on price and quality. It will also likely impede the ability of health plans to use selective contracting, a key mechanism for promoting quality and cost-containment goals.

<sup>38</sup> *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *FTC v. Tlor Title Ins. Co.*, 504 U. S. 621, 636 (1992)); *see also* *North Carolina State Bd. of Dental Examiners v. FTC*, No. 12-1172 (4th Cir. May 31, 2013) (no state action immunity for dental board that sought to exclude non-dentist competitors in teeth whitening services).

<sup>39</sup> *FTC v. Phoebe Putney*, 133 S. Ct. at 1015 (state legislature's objective of improving access to affordable health care does not logically suggest contemplation of anticompetitive means, and "restrictions [imposed upon hospital authorities] should be read to suggest more modest aims."). As the U.S. Court of Appeals for the Fourth Circuit has observed, "[f]orewarned by the [Supreme Court's] decision in *National Society of Professional Engineers* . . . that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Virginia Acad. of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4th Cir. 1980).



United States of America  
**Federal Trade Commission**

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**Health Care, Technology, and Health Care Technology:  
Promoting Competition and Protecting Innovation**

**Remarks of Maureen K. Ohlhausen<sup>1</sup>  
Commissioner, Federal Trade Commission**

**before  
The Connecticut Bar Association  
Antitrust & Trade Regulation and Consumer Law Sections  
Hartford, Connecticut**

**February 26, 2014**

**I. Introduction**

Good evening. Thank you to Erika Amarante and Bob Langer for inviting me to participate in this event. I am delighted to speak to you today about the Federal Trade Commission's recent efforts to protect competition and consumer welfare in two overlapping sectors of the U.S. economy: the health care sector and the technology sector. Each of these sectors represents a significant portion of the U.S. economy. Together, they comprise many key areas of innovation and change in private commerce, as well as central areas of concern for policy makers. I want to talk about some of the work that my agency has done in these two areas, as well as some issues where they intersect in health information technology and telemedicine.

As you know, the U.S. health care sector is undergoing a non-trivial amount of change

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<sup>1</sup> The views expressed in these remarks are my own and do not necessarily reflect the views of the Commission or any other Commissioner. I would like to thank Daniel J. Gilman for his assistance in preparing this speech.

with the passage of the Patient Protection and Affordable Care Act,<sup>2</sup> which reaches far beyond the hotly discussed topics of the health care exchanges and the web site. Partly due to the Affordable Care Act, the health care sector has seen a significant amount of consolidation — among hospital systems and among physician groups, as well as combinations of hospitals and physician groups. On the tech side, under the American Recovery and Reinvestment Act of 2009,<sup>3</sup> the Centers for Medicare and Medicaid Services (CMS) has already spent more than \$19 billion on electronic health records, or “e-HRs,” including incentive payments to encourage health care providers and professionals to implement e-HR systems.<sup>4</sup> As they say in Washington, a billion here, a billion there. But, it is not just real money at issue. It is spending and regulation that affects the shape of tech markets and health care practice, affects the integration of health care providers and health care information, and implicates standard-setting, payment, privacy, data security, and many other issues in the health and health-tech sectors.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct and regulation in health care markets has long been a key focus of FTC law enforcement, research, and advocacy. The FTC has investigated and litigated antitrust cases in markets across the country involving hospitals, physicians, pharmaceuticals, and other health care goods and services.<sup>5</sup> We regularly issue informal advisory opinions on the

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<sup>2</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>3</sup> Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>4</sup> See Ctrs. for Medicare and Medicaid Servs., HER Incentive Programs: the Latest Monthly Payment and Registration Summary Report (Dec. 2013), *available at* [http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/Downloads/December2013\\_SummaryReport.pdf](http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/Downloads/December2013_SummaryReport.pdf).

<sup>5</sup> See, e.g., FED. TRADE COMM’N STAFF, OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2013), *available at* <http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf>; FED. TRADE COMM’N STAFF, OVERVIEW OF FTC ANTITRUST ACTIONS IN PHARMACEUTICAL SERVICES AND PRODUCTS (2013), *available at* <http://www.ftc.gov/bc/healthcare/antitrust/rxupdate.pdf>.

application of the antitrust laws to health care markets.<sup>6</sup> In addition, we have conducted hearings, undertaken research, and issued reports and policy statements on various issues in health care competition, often in conjunction with the U.S. Department of Justice (DOJ).<sup>7</sup>

The hearings, research, reports, and other competition policy efforts represent a distinctive part of the FTC's statutory mission under the FTC Act and are a crucial complement to our law enforcement mission. Next month, we are conducting a two-day workshop -- scheduled for March 20 and 21 and open to the public -- to examine a range of health care competition issues, including ones raised by the regulation of health care professionals, innovations in health care delivery, advances in health care technology, the measurement of health care quality, and price transparency.<sup>8</sup> I would encourage you to attend this workshop, if you can.

These types of research and education projects play an especially important role in dynamic industries, where it is important for the Commission to be apprised of facts on the ground in a changing landscape and to spot competition and consumer protection issues as they arise -- and not just in hindsight. In those quickly evolving industries, we should always be mindful of both the fact that the ground may be shifting and the fact that we want it to do exactly that. We want a law enforcement and regulatory environment that protects consumers against

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<sup>6</sup> Information regarding the Commission's competition advisory opinion program is available at <http://www.ftc.gov/bc/advisory.shtml>.

<sup>7</sup> See, e.g., FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM (2011), available at <http://www.ftc.gov/opp/aco/>; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ENFORCEMENT POLICY IN HEALTH CARE (1996), available at <http://www.justice.gov/atr/public/guidelines/1791.htm>.

<sup>8</sup> Information regarding the workshop is available at <http://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition>.

substantial market failure and fraud, but we also want an environment that permits and even fosters innovation.

It is not surprising, then, that the FTC has pursued these types of policy development efforts in the tech sector as well as the health care sector. Last November, the FTC held a workshop on “the Internet of Things” – that is, all sorts of sensors and other types of telemetry embedded in physical objects, from watches to cars to medical devices, which are linked through wired and wireless networks using the Internet. We held the workshop to get a better sense of this emerging space and a better understanding of how to achieve its benefits while reducing risks to consumers’ privacy.<sup>9</sup> As someone who has focused on technology policy, I am inspired by the transformative potential of the Internet of Things, but I am also sensitive to the fact that the ability to collect large amounts of information and, in some cases, to act on that information also raises important consumer privacy and data security issues.

Our research in the tech sector continues, as we recently announced a proposal to gather information on patent assertion entities, or PAEs, and other types of entities asserting patents in the wireless communications sector.<sup>10</sup> These entities are also affectionately, or not so affectionately, referred to as patent trolls by some people. Using our authority under Section 6(b) of the FTC Act,<sup>11</sup> which allows us to obtain information under compulsory process from market participants and pursue a study of a particular competition (or consumer protection) issue, the FTC will study the impact of patent assertion entity activity on competition and innovation,

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<sup>9</sup> Information regarding this workshop is available at <http://www.ftc.gov/news-events/events-calendar/2013/11/internet-things-privacy-and-security-connected-world>.

<sup>10</sup> See Press Release, Fed. Trade Comm’n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), available at <http://www.ftc.gov/opa/2013/09/paestudy.shtml>.

<sup>11</sup> 15 U.S.C. § 46(b).



hopefully providing us with a better understanding of the activity of PAEs and its various costs and benefits.

In the rest of this speech, I would like to focus on recent competition advocacy efforts pursued by the FTC in the health care area, as well as some competition and regulatory policy issues that the FTC and other policy makers will have to confront with the emergence of telemedicine.

## **II. Important Role of Competition Advocacy**

Advocating for competition is an important part of the FTC's mission. Broadly speaking, competition advocacy at the FTC involves the use of our expertise in competition and economics to persuade other government actors to pursue policies that promote competition and consumer welfare. This advocacy takes a number of forms, including providing testimony or comments on proposed federal and state legislation and regulations, advising other federal agencies on competition issues, filing amicus briefs in federal and state courts, and advocating for competition principles in public fora. Sometimes, this advocacy is conducted in *support* of a particular law or regulation that would benefit competition and consumers. All too often, however, advocacy addresses proposed laws or regulations that would limit choices and make consumers worse off – by, for example, restricting certain business practices or prohibiting some business models altogether, or even seeking to immunize certain anticompetitive conduct from the federal antitrust laws. Even if well-intentioned, these government-imposed restraints can inflict as much, if not more, harm on consumers than private anticompetitive conduct. And, as statutes or regulations enacted by the government, these restraints are, of course, more durable than any private conduct could be.

Not surprisingly, a significant portion of the FTC's competition advocacy work is focused on the health care sector. Over the past decade, we have targeted, among other things, (1) proposed antitrust immunity for certain health care providers to bargain collectively with health insurers, (2) scope of practice regulations, and (3) restrictions on retail clinics. I will discuss these in turn.

#### **A. Proposals for Antitrust Immunity**

First, and particularly troublesome as far as I am concerned, are federal and state legislative proposals to create antitrust exemptions for collective negotiations by otherwise competing health care providers. The FTC has long advocated against such exemptions for the simple reason that they tend to raise prices and harm consumers. A recent letter issued by FTC staff addressed just such a proposed exemption in the state of Connecticut.<sup>12</sup> I should point out that the FTC staff did this analysis – as is our practice – at the request of state policy makers. This particular letter also enjoyed the support of the Connecticut Attorney General's office, with AG George Jepson having voiced concerns similar to ours in independent testimony before the state legislature.

The Connecticut bill provided for the formation of so-called health care collaboratives comprising otherwise independent health care practitioners, such as physicians. It would have authorized these collaboratives to jointly negotiate prices and other terms with health plans, requiring the health plans to deal with the collaboratives only under particular terms and under the threat of substantial financial penalties, but not vice versa. It also attempted to immunize these joint negotiations from scrutiny under the antitrust laws.

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<sup>12</sup> See Letter from Fed. Trade Comm'n Staff to Conn. Gen. Assemb. Labor & Pub. Emps. Comm. regarding Conn. H.B. 6431 (June 4, 2013), available at <http://www.ftc.gov/os/2013/06/130605conncoopcomment.pdf>.

As the FTC staff recognized in their advocacy letter, collaborations among physicians and other health care professionals can benefit consumers. At the same time, the letter made three primary arguments against the bill. First, the antitrust laws are *not* a barrier to the formation of efficient health care collaborations that benefit consumers. As explained in guidance issued by the FTC and the Justice Department, competitor collaborations – including health care provider collaborations – often are entirely consistent with the antitrust laws.<sup>13</sup> That is, the antitrust laws do not stand in the way of health care providers who form collaborative arrangements that are likely to reduce costs and benefit consumers through increased efficiency and improved coordination of care. We have also produced detailed advisory opinion letters on specific integration proposals by various types of providers.<sup>14</sup> In addition, the FTC and DOJ have provided joint guidance concerning both Medicare and commercial accountable care organizations (ACOs) to ensure that the prospect of antitrust liability would not impede the formation of beneficial ACOs.<sup>15</sup> In fact, the FTC/DOJ policy statement on ACOs established a process for newly formed ACOs to seek an expedited agency review if they are concerned about potential antitrust exposure.<sup>16</sup>

Second, the Connecticut advocacy letter observed that a central purpose of the proposed legislation appeared to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients.

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<sup>13</sup> See generally FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>14</sup> See *supra* note 6.

<sup>15</sup> See Fed. Trade Comm'n & U.S. Dep't of Justice, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67,026 (Oct. 28, 2011); see also generally Susan S. DeSanti, *ACO Antitrust Guidelines: Coordination Among Federal Agencies*, ANTITRUST SOURCE 1, Dec. 2011.

<sup>16</sup> See FTC/DOJ ACO Policy Statement, *supra* note 15, at 67,030-31.

Third, because procompetitive health care collaborations already are permissible under the antitrust laws, the bill's main effect would be to foster precisely those types of collective negotiations that would *not* generate efficiencies and therefore would *not* pass muster under the antitrust laws. The joint negotiations contemplated by the bill were likely to lead to increased health care costs and decreased access to services for consumers. Given the substantial risk that the bill would encourage the formation of inefficient and anticompetitive collaborations among providers, FTC staff urged Connecticut legislators not to attempt to shield them from the antitrust laws. Thus far, at least, they have not done so.

Looking beyond the proposed Connecticut bill, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from health insurers and other payers, asserting that immunity for joint bargaining is necessary to "level the playing field" so that providers can create and exercise countervailing market power. Our response has come down to the following point: reducing competition on one side of a market (that is, physicians or other providers) is not the answer to a perceived lack of competition on the other side of that market (that is, insurers and other third-party payers). If we start to prop up certain parts of the playing field, we will likely find that our landscaping abilities have their limits. More than that, we need to worry that consumers might find themselves in an ever-deepening pit in the middle, as other stakeholder positions get one boost after another. The U.S. antitrust agencies have consistently opposed these exemptions because they are likely to harm consumers by increasing costs without improving quality of care, and I expect that we will continue to oppose these attempts to authorize departures from competition.

## B. Scope of Practice Regulations

A second area of focus for our competition advocacy has been scope of practice regulations, which often seek to limit competition from newer providers that are able to supply comparable (or even superior) services – often at lower cost. In many states, there has been an interest in allowing basic medical services to be provided, not just by physicians, but by advanced practice registered nurses, or APRNs, who are nurses with graduate nursing degrees in addition to undergraduate nursing education and practice experience. APRNs include both general nurse practitioners and specialists, such as nurse-midwives or certified registered nurse anesthetists. This expanded licensing of APRNs could have increase affordable access to quality care in rural and poorer areas of the country – that is, where there are fewer physicians. The FTC’s Office of Policy Planning – which I had the honor of heading from 2004 to 2008 – has been actively advocating to state legislatures to loosen the restrictions on APRNs to allow them to provide certain treatments and to prescribe certain medications, subject, of course, to responsible measures to control for quality and safety.<sup>17</sup> In short, our advocacies have suggested that any limits on APRNs’ ability to provide medical services should be no stricter than necessary to protect patient safety. Interestingly, our competition analyses on these restrictions is closely aligned with the health policy analysis of the Institute of Medicine, which concluded

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<sup>17</sup> See, e.g., Letter from Fed. Trade Comm’n Staff to the Hon. Kay Khan, Mass. H.R., Concerning the Likely Competitive Impact of H.B. 2009 (Jan. 17, 2014), available at <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/01/ftc-staff-comment-massachusetts-house-representatives>; Letter from Fed. Trade Comm’n Staff to the Hon. Theresa W. Conroy, Conn. H.R., Concerning the Likely Competitive Impact of Conn. H.B. 6391 on Advanced Practice Registered Nurses (Mar. 19, 2013), available at <http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf>; Testimony of Fed. Trade Comm’n Staff before Subcommittee A of the Joint Comm. on Health of the State of W. Va. Legis. on the Review of W. Va. Laws Governing the Scope of Practice for Advanced Practice Registered Nurses and Consideration of Possible Revisions to Remove Practice Restrictions (Sept. 10, 2012), available at <http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf>.

that “[r]estrictions on scope of practice . . . have undermined the nursing profession’s ability to provide and improve both general and advanced care.”<sup>18</sup>

### C. Limited Service Clinics

A third, related, set of advocacies have addressed so-called retail clinics or limited service clinics – the types of small, limited, primary care service clinics you have probably seen at some chain drug stores, supermarkets, or malls. Retail clinics tend to be staffed by APRNs, and they offer consumers a convenient way to obtain basic medical care at transparent and competitive prices.<sup>19</sup> Evidence indicates that retail clinic care, although limited in scope, tends to be of high quality.<sup>20</sup> That may be partly due to the fact that APRNs generally get high marks for quality of care and, in retail clinics, only provide a very basic and limited set of the health care services that they are trained to provide. It may be partly due, as well, to their use of electronic health records, electronic prescribing, and up-to-date practice guidelines, as well as remote oversight and consultation – basic forms of telehealth that can deliver expertise where and when it is needed, but may run afoul of particular state supervision requirements for APRNs. I will return to the subject of telehealth shortly.

One of the major competition issues with retail clinics has been separating bona fide attempts to provide basic health and safety quality assurances from attempts to suppress innovative models of health care delivery. For example, in 2007, we reviewed proposed clinic rules next door, in Massachusetts. In that case, the Department of Public Health seemed to

<sup>18</sup> INST. OF MED., THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH 4 (2011), available at [http://www.thefutureofnursing.org/sites/default/files/Future%20of%20Nursing%20Report\\_0.pdf](http://www.thefutureofnursing.org/sites/default/files/Future%20of%20Nursing%20Report_0.pdf).

<sup>19</sup> See, e.g., William M. Sage, *Might the Fact that 90% of Americans Live Within 15 Miles of a Wal-Mart Help Achieve Universal Health Care?*, 55 U. KAN. L. REV. 1233, 1238 (2008) (describing the size and scope of retail clinics).

<sup>20</sup> See, e.g., Ateev Mehrotra et al., *Comparing Costs and Quality of Care at Retail Clinics with That of Other Medical Settings for 3 Common Illnesses*, 151 ANNALS OF INTERNAL MED. 321, 325-6 (2009) (explaining that evidence shows that the quality of care in limited service clinics is “similar to that provided in physician offices and urgent care centers and slightly superior to that of emergency departments”).

recognize the pro-competitive and pro-consumer potential of the clinics. Most of the proposed rule seemed to try to make room for the clinics within the larger body of the state's health care clinic regulations. FTC staff generally did not find concerns with much of what was proposed in Massachusetts.<sup>21</sup> Certain stakeholders had, however, lobbied for very restrictive pre-screening requirements for all clinic advertising – including things like changes to web site listings of hours of operation and the availability of flu shots – that were not imposed on other types of health care facilities and seemed potentially very burdensome for operators of small, low-cost, flexible clinics. I am glad to report that the Department of Public Health took our economic and legal concerns seriously and eliminated the troubling provisions from its final rule. You can find retail clinics operating across Massachusetts today or, closer to home, here in Connecticut. Whether these clinics offer what you or your family need or want is for you to say, not for competitor-crafted regulations.

To be clear, trying to formulate some sort of competitively ideal clinic regulations has never been our concern, and we are in no position to value a state's own health and safety priorities. We have been concerned, however, where heightened restrictions seem to be aimed at particular businesses or business models, rather than particular and well-founded consumer risks, both because the restrictions might discriminate against an innovative model of delivery and because they can work as *de facto* scope of practice restrictions on those professionals employed under the model. For example, proposed Kentucky rules would have allowed an APRN practicing at a retail clinic to provide physical exams for sports or camp, but not for school. The same practitioner could provide a school physical at comparable clinics, however.<sup>22</sup> Maybe there

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<sup>21</sup> See Letter from Fed. Trade Comm'n Staff to Mass. Dept. of Public Health Concerning Proposed Regulation of Limited Service Clinics (Sept. 27, 2007), available at <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2007/10/ftc-staff-comment-massachusetts-department-public>.

<sup>22</sup> See Kentucky Letter, *supra* note Error! Bookmark not defined., at 6.

is a decent health and safety rationale for that distinction, but it is hard to imagine what it could be, and no such thing was ever entered into the record. A working parent who has a hard time scheduling that school physical and a harder time still doing it when he or she can get off work might really appreciate a low-cost, after-hours option with an APRN just down the road. If the clinic wants to offer that service from a qualified, licensed health care professional, there ought to be a good reason why that is not allowed, and in my view protecting incumbent providers from new forms of competition does not count.

### **III. Telemedicine: Policy Measures for the Future of Health Care**

The last area that I would like to address is telemedicine, which is a developing and, for me, intriguing area at the intersection of health care and technology. The prefix "tele" comes from the Greek word meaning far, and the modern era has been shaped by technologies that put us in touch with others who are far away, such as the telegraph (far writing), the telephone (far hearing), the television (far seeing), and telemetry (far measuring). As revolutionary as these technologies have been on their own, they have the potential to offer great benefits in another "tele" field, telemedicine, which combines many of these capabilities to monitor, diagnose, and in some cases even treat patients who are in different locations than their doctors or other medical professionals, whether they are separated by a hospital floor, a state line, or even an ocean.

As a policy maker, I believe we also need to be far seeing and far reaching in our policies to allow the potential of telemedicine to become a reality for patients in the U.S. Although this will necessarily involve a wide array of government and private actors, as an FTC Commissioner, there are policies that I can encourage my agency to pursue to help facilitate the successful proliferation of telemedicine.



Telemedicine – sometimes called telehealth – might sound like science fiction, but it is important to keep in mind that many of its most interesting applications involve tried and true technologies, applied in novel ways. For example, Dr. Sanjiv Arora at the University of New Mexico struggled for years with Hepatitis C referrals from rural parts of the state, where patients faced real shortages of primary care doctors, not to mention specialists. As you might imagine, patients who are uninsured or underinsured or simply live in rural areas often have limited access to state-of-the-art specialty care. People with chronic diseases like Hepatitis C can sometimes travel to larger cities and seek access to tertiary care centers, but it is often difficult for them to do so – even once they have a correct diagnosis.

To deal with this problem, Dr. Arora did not establish a network of clinics staffed with multidisciplinary specialists across the far-flung regions of New Mexico. Instead, he established what is called the ECHO Program – the Extension for Community Health Outcomes.<sup>23</sup> The ECHO program uses telehealth technology and best practices protocols to connect rural primary care practices with multi-disciplinary specialist resources at the University's academic medical center in Albuquerque. That connection enabled him to do two things: deliver expertise to primary care providers and patients far from his academic medical center and – maybe more radically – use that consultation and delivery of care to help train a far-flung network of primary care doctors with significant expertise in the diagnosis and treatment of Hepatitis C. No extra residency or board certification; no extra professional licensure; just heightened practice abilities that allow the doctors to better diagnose and treat this disease and to refer patients earlier, when

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<sup>23</sup> See Sanjeev Arora, et al., *Expanding Access to Hepatitis C Virus Treatment—Extension for Community Healthcare Outcomes (ECHO) Project: Disruptive Innovation in Specialty Care*, 52 HEPATOLOGY 1124 (2010).

referral is needed. The program has provided more than 57,000 hours of continuing medical education to more than 300 clinical care teams in 74 New Mexico communities.<sup>24</sup>

Due to its documented success – made easier with electronic records and remote monitoring – Project ECHO has expanded to deal with a number of other disease indications, including hypertension, diabetes care, chronic pain, and HIV care. ECHO centers have been established at the University of Chicago, the University of Washington, in Mumbai, India, and – closer to home – at the Community Health Center in Middletown, Connecticut.

I want to remark on a couple of additional features of the ECHO program. First, recalling our nursing competition advocacies, ECHO now employs and is expanding the use of APRNs to improve its network of primary care professionals in rural and underserved areas. In some states, this is simply harder to do than in others because of state-by-state regulatory differences, not differences in APRN training or quality of care.

Second, although Dr. Arora's ECHO program generally serves New Mexico patients, many newer implementations of the ECHO model work across state lines. Some states permit that and some do not. Telemedicine can reduce the costs and extend the reach of many health care services, but the advantages of remote and networked expertise do not always fit professional licensing schemes that were developed to regulate local medical practices – practices historically dominated by face-to-face encounters between a physician and her patient. What counts as telemedicine, telehealth, or “the practice of medicine,” and when telemedicine requires a local state license, is generally a matter of state law and sometimes left to determinations of independent state boards. Link experts across three or four jurisdictions and things start to get pretty complicated and, for providers, unpredictable. Generally, the practice of

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<sup>24</sup> See Sanjeev Arora, et al., *Demonopolizing Medical Knowledge*, 89 ACADEMIC MED. 30, 32 (2014).

medicine without such licensure is prohibited and subject to criminal sanction by statute. The variation in requirements persists despite the fact that the core entry requirements for physicians are essentially uniform across the U.S.<sup>25</sup>

Some provider services have responded to the state regulatory patchwork by buying dozens of licenses for their practitioners – doable for some, but probably a barrier for many would-be entrants, and efficient for nobody. My point is not anti-licensure and it is not that we need some particular model of state or federal regulation. It is that we need to take seriously that our legacy statutes and regulations have, in addition to strengths, some serious competitive weaknesses. In particular, they can erect barriers to the efficient flow of health care information and expertise and, indeed, specialized labor – barriers that can be costly to public and private payers and, in the end, individual patients and barriers that do not always offer countervailing consumer protection benefits. As lawyers and policy makers, we need to think creatively about ways to lower these barriers without sacrificing what works in our regulations.

In what I view as a positive development, a bipartisan group of sixteen U.S. Senators recently commended state medical boards and the Federation of State Medical Boards (FSMB) for their efforts to streamline the licensing process for physicians who wish to practice in multiple states.<sup>26</sup> More specifically, the Senators applauded the boards' development of the Interstate Medical Licensure Compact (Compact), which would provide a new licensing option under which qualified physicians seeking to practice in multiple states would be eligible for

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<sup>25</sup> All state medical boards recognize and require passage of the same sequence of tests: the United States Medical Licensing Examination (USMLE), which is jointly administered by the Federation of State Medical Boards and the National Board of Medical Examiners. See, e.g., Fed'n of State Med. Bds., *State of the States: Physician Regulation* 2009, at 3, 10-11 (2009).

<sup>26</sup> See Fed'n of State Med. Bds., Press Release, *State Medical Board Effort to Streamline Medical Licensing Gains Support in U.S. Senate* (Jan. 14, 2014), available at [http://www.fsmb.org/pdf/interstate\\_compact\\_senators\\_january13C.pdf](http://www.fsmb.org/pdf/interstate_compact_senators_january13C.pdf). The letter from the U.S. Senators is available at [http://www.thune.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=9fa6e905-ec33-4191-bd79-ad6991942dac](http://www.thune.senate.gov/public/index.cfm?a=Files.Serve&File_id=9fa6e905-ec33-4191-bd79-ad6991942dac).

expedited licensure in all states participating in the Compact, which would be voluntary, for both states and physicians. This Compact, while still in development, would appear to greatly facilitate the use of telemedicine while still allowing states to regulate medicine within their borders.<sup>27</sup>

Now, there are of course other applications of established technology beyond telemedicine. For example, how about electronic prescribing so that your pharmacy can read the prescription that your physician did not have to write out in script? And that you did not have to hand-deliver, or possibly lose before you get to the pharmacy? And perhaps automatically check for contraindications or other issues? This is well-established technology in most pharmacies, if in a smaller percentage of physician offices.

The application of established technology can be truly innovative and can pay great dividends, but we also want to pay attention to nascent technology. Remember the Internet of Things? For some reason, the most cited example of the potential benefit of the Internet of Things is that your refrigerator will note that you have run out of milk and it will email or text you to remind you to buy milk. Maybe milk is a more important part of some people's lives than it is of mine, but I am much more excited about the prospect that a wearable health device will detect an impending medical crisis and alert me or my doctor. Maybe that's just me, but consider this: recently, a story about Google – no, this is new and it does not concern an antitrust investigation – really caught my eye, so to speak. Google has been testing a means of monitoring blood glucose levels for diabetics, not through a pinprick, but through a contact

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<sup>27</sup> There have been policy discussions of various options to lower barriers to interstate practice of telemedicine for some time. See, e.g., Daniel J. Gilman, *Physician Licensure and Telemedicine: Some Competitive Issues Raised by the Prospect of Practicing Globally While Regulating Locally*, 14 J. HEALTH CARE L. & POL'Y 87, 117 (2011).

lens.<sup>28</sup> Monitor, record, and, ultimately, transmit. I don't know if that's the greatest thing since sliced bread or free search, but for me, if it works, it is much more exciting than a glass of milk.

We might have all sorts of questions about new devices like this: How well do they work? What will they cost? From a competition perspective, what, if any, barriers to entry are there in these types of industries? And, from a consumer protection standpoint, what are the provisions for the security of our personal health information? This is a particularly interesting area for me as an FTC Commissioner because it draws together several hot issues my agency has been addressing and will continue to address for the foreseeable future, including data security and mobile privacy in the consumer protection space, as well as competition issues such as net neutrality and broadband data prioritization.

On a more philosophical level, these developments also raise the question of what is the best approach for a government agency like the FTC to take with regard to technological and business innovation. The success of the Internet and the tech sector have in large part been driven by the freedom to experiment with different business models, the best of which have survived and thrived, even in the face of initial unfamiliarity and unease about the impact on consumers and competitors. If health care needs anything, it needs this type of innovation too. It is thus vital that policy makers, like myself, approach new technologies with a dose of regulatory humility, by working hard to educate ourselves and others about the innovation, understand its effects on consumers and the marketplace, identify benefits and likely harms, and, if harms do arise, consider whether existing laws and regulations are sufficient to address them before assuming that new rules are required.

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<sup>28</sup> See Google's Vision of Diabetes through a Contact Lens, PR Web (Feb. 21, 2014), available at <http://uk.prweb.com/releases/contact-lenses/diabetes/prweb11604772.htm#ixzz2tzjaMdbt>.

For the FTC, I believe we can help ensure that the promise of innovations in health care technology, like telemedicine and the Internet of Things, is realized by using our unique set of policy and law enforcement tools. First and foremost, in a new technology or industry that is rapidly innovating, we should use our policy research and development function to get a better understanding of: the technology itself; the new business models it may enable; any existing regulatory structures, including any self-regulation; relevant market dynamics; and the nature and extent of likely consumer and competitive benefits and risks. We should also use our policy tools to educate other policy makers, as well as ourselves, about undue impediments to innovation and competition. Of course, the FTC is also an enforcement agency and it can and should use its traditional deception and unfairness authority to stop consumer harms that may arise from particular health information technology devices.

Finally, the FTC should use its flexible and fact-intensive approach to antitrust enforcement to investigate and, where appropriate, challenge competitive harms occurring in health care, technology, and even health care technology. There is much that we can do here, and we have a variety of tools with which to do it. To take a cue from the doctors, however: first, we should do no harm.

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Thank you very much for your attention. I would be happy to entertain any questions you may have.